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Supreme Court of the United States

OCTOBER TERM, 1963

No. 384

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ETC.,

Petitioner,

—vs.—

NEW YORK MAILERS' UNION NUMBER SIX,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 48-54) is reported at 317 F. 2d 624. It reversed in part an order of the District Court for the Southern District of New York. The opinion of the District Court (R. 3-4) is unofficially reported at 52 LRRM 2101.

Jurisdiction

The order and judgment of the Court of Appeals was entered on May 20, 1963. The petition for a writ of certiorari was filed August 17, 1963, and was granted on November 12, 1963, 375 U. S. 901. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statutes Involved

The statutes involved are Sections 4 and 7 of the Norris-LaGuardia Act, 29 U. S. C. §§ 104, 107; Section 301(a) of the Taft-Hartley Act, 29 U. S. C. § 185(a), and Sections 3, 4 and 6 of the United States Arbitration Act, 9 U. S. C. §§ 3, 4 and 6. These statutes are set forth in the Appendix.

Question Presented

Whether Section 7 of the Norris-LaGuardia Act applies to an order of a district court staying certain internal union proceedings pending arbitration compelled by the court, where the stay is based upon a "status quo" provision in the collective bargaining agreement designed to preserve the issue sought to be arbitrated and does not relate to any activity enumerated in Section 4 of Norris-LaGuardia.

Statement of the Case

A. *The Parties*

Petitioner, Publishers' Association of New York City (hereinafter the "Association"), is the collective bargaining agent for its members, publishers of daily newspapers in New York City, in their negotiations with most of the unions representing their employees. The Association also provides services in connection with grievances brought to arbitration by either party under the collective bargaining agreements.

Respondent, New York Mailers' Union Number Six (hereinafter the "Union"), represents employees in the mailrooms of the members of the Association, including The New York Times Company (hereinafter the "Times"), and was and is party to a collective bargaining agreement with the As-

sociation. The Union is a subordinate local of the International Typographical Union (hereinafter the "ITU"), and is subject to the Constitution, By-Laws and General Laws of the ITU.

B. *The Grievance*

Foremen are required to be members of the Union under the collective bargaining agreement with this Union (Contract, § 4, R. 6). Such a clause has historically been a part of labor contracts with mechanical unions in the newspaper industry in New York City. However, because foremen are the representatives of management and because management is held accountable for their actions, the Association and its members have consistently endeavored to protect foremen from any form of union discipline relating to the performance of their duties. The importance of this position to the Association is set forth in the affidavit of C. Raymond Hulsart, Director of Industrial Relations at the Times, submitted in support of the motion to compel arbitration and to stay the internal Union disciplinary proceedings (R. 22-24). This Union agreed to a contractual provision prohibiting discipline of the foreman. Section 20-e of the collective bargaining agreement provides:

> "The Union shall not discipline the Foreman for carrying out the instructions of the Publisher or his representative" (R. 6).[1]

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[1] This clause was relied upon by the Union in this Court in *Labor Board* v. *News Syndicate Co.*, 365 U. S. 695 (1961), and in the Court of Appeals in that case, 279 F. 2d 323 (2d Cir. 1960), to support the legality of the foreman membership clause and to defend against a finding of discrimination by the foreman against a nonunion employee made by the Board against the employer and the Union. Justice Douglas, writing for the majority, based his determination that the foreman membership clause was not unlawful at least in part upon the existence of Section 20-e, which he quoted (365 U. S. at 696), and referred to in determining that "the foremen [are] '*solely* the employers'

Despite this provision, the Union notified Everett Rowan, a foreman at the Times, that charges had been filed against him by James Kelly, a member of the Union (R. 14), and that he (Rowan) was summoned to appear before the Union concerning the charges (R. 15). The charges (R. 12, 13) clearly related to work performance by Kelly and to the performance of his managerial duties by Rowan.

The Association promptly protested (R. 16) and demanded arbitration if the Union did not withdraw the charges against Rowan. It also demanded that the status quo be maintained in accordance with Section 34 of the contract.[2] The broad arbitration clause (§ 33) and the status quo clause (§ 34) are set forth in the Record, pp. 6-8. It was the Association's position that the act of summoning the foreman down to the Union offices to answer charges in and of itself constituted discipline in violation of Section 20-c of the contract (R. 21, 22).

The Union refused to arbitrate and declined to honor the status quo clause, calling the Association's protest, grievance, and demand "officious intermeddling" (R. 17, 18).

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agents,' as the Court of Appeals concluded." (id. at 699.) Indeed, the Court of Appeals had said that because of this clause the foremen "were not subject to the conflicting obligations of two masters" (279 F. 2d at 330).

[2] In the newspaper industry, at least, preservation and enforcement of the status quo clause is of prime importance. Our product is extremely perishable. If the papers are not out on time, they might as well be discarded. The product cannot be stockpiled in anticipation of work stoppages and sales lost on any day are lost forever. The alternatives to status quo and arbitration are surrender to unwarranted union demands or breach-of-contract work stoppages. The Board recognized the Association's vulnerability in this regard in *Publishers' Association (Mailers' Union)*, 139 NLRB 1092, 1099 (1962), appeal argued No. 27,943, 2d Cir. October 25, 1963. Therefore, while the status quo clause often restricts management in making changes protested by the unions, management is willing to suffer such delays so long as production of its product continues without interruption pending arbitration. The

C. *The Court Proceedings Below*

The Association proceeded in district court to compel the Union to arbitrate. In order that its rights would not be frustrated before the arbitration could be heard and decided, it also sought a stay of any proceedings by the Union against Rowan. By order to show cause, the Association obtained a temporary restraining order pending the hearing of the motion (R. 18-19). Jurisdiction of the federal court was invoked under both Section 301 of the Taft-Hartley Act and the United States Arbitration Act, 9 U. S. C. § 1 et seq. (R. 5). Because the jurisdiction of a federal district court to compel arbitration in an action pursuant to Section 301 had been clearly declared by this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), the Association proceeded in the more cumbersome form of a plenary suit, rather than the more flexible petition procedure permitted by Sections 4 and 6 of the Arbitration Act.[3]

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promise to maintain conditions pending arbitration is a mutual one and the unions should be required to honor it where the grievance is filed by the employer, just as the employers honor it where the union is the grievant.

[3] Some doubt has been raised as to the applicability of the Arbitration Act and its procedures in this area. *See, e.g., Poch* v. *New York Typographical Union*, 223 F. Supp. 181 (S. D. N. Y. 1963), where the district judge noted (p. 183), "disagreement between circuits over the question whether collective bargaining agreements in non-transportation industries are excluded from the Arbitration Act as 'contracts of employment' (9 U. S. C. § 1) has never been explicitly settled by the Supreme Court." It is submitted that on the reasoning of Judge Frank, in *Signal-Stat Corp.* v. *Local 475, etc.*, 235 F. 2d 298 (2d Cir. 1956), cert. den. 354 U. S. 911 (1957), and Judge Medina in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), cert. dismissed per stipulation 364 U. S. 801 (1960), the procedures under the Arbitration Act should be declared available to all parties properly before the federal courts in matters relating to arbitration. *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254 (1962), while silent on the statutory basis for the stay of the damage action pending arbitration, does im-

The district court granted the motion to compel arbitration and restrained the Union from proceeding with its disciplinary proceedings (R. 2, 3-4).[4] The Union appealed to the Court of Appeals where that part of the order compelling arbitration was affirmed, but the part staying the disciplinary proceedings by the Union was reversed (R. 55). The Court of Appeals based the reversal of the stay on its conclusion that Section 7 of the Norris-LaGuardia Act applied and precluded any injunctive relief where its procedural requirements had not and could not be met.

The arbitration proceeding has been held in abeyance pending the petition for certiorari and the review by this Court. The Union, although freed from the restraining order, agreed voluntarily to withhold further action in the disciplinary proceedings until after the determination by this Court.

Summary of Argument

A. Enforcement of a status quo clause in a collective bargaining agreement by a federal district court (where the activity enjoined is not conduct enumerated in Section 4 of Norris-LaGuardia) stands on the same footing as enforcement of an arbitration clause. If an order compelling arbitration is exempt, an order preserving the status quo pending arbitration should likewise be exempt

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judicially hold that the Arbitration Act procedures are available to litigants in federal court in Section 301 suits, since the union's application for the stay in district court was based upon Section 3 of the Arbitration Act (196 F. Supp. 148).

[4] As noted in his memorandum opinion, Judge Murphy on the same day compelled arbitration and granted a stay of union discipline of two composing room supervisors by the Typographical Union in *Publishers' Association v. New York Typographical Union No. 6*, 62 Civ. 3024, S. D. N. Y. 1962 (not officially reported). No appeal from the order in that case has been perfected in the Court of Appeals.

from the requirements of Section 7 of the Norris-LaGuardia Act. The "injunction" granted by the district court here is more akin to the mandatory injunction compelling arbitration approved by this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), than to the injunction restraining a strike disapproved in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1952). The Court of Appeals should have applied *Lincoln Mills* and not *Sinclair*.

B. The congressional policy of encouraging and supporting private settlement methods to resolve labor disputes requires the granting of the ancillary relief sought here.

C. Section 7 of the Norris-LaGuardia was not designed to deprive the federal courts of their inherent power to protect and make effective their mandates involving activities not prohibited by Section 4 of that Act. The power to stay a judicial proceeding on an issue subject to arbitration, whether based upon the inherent power of the court or Section 3 of the Arbitration Act, is not subject to the requirements of Section 7 of the Norris-LaGuardia Act. Similarly, the power to stay internal union proceedings on an issue subject to arbitration, which is based upon a contractual promise to maintain the status quo pending arbitration should not be subject to the inappropriate requirements of Section 7 of Norris-LaGuardia Act.

ARGUMENT

I.

Lincoln Mills governs this case. Since Section 7 of Norris-LaGuardia does not apply to mandatory injunctions compelling arbitration of labor disputes, it should not apply to a stay of non-Section 4 activities designed to preserve an issue for arbitration.

The main vice of both the Union's and Judge Hays' analyses is that this case is not, as Judge Hays suggested (317 F. 2d at 626), "exactly the situation" with which this Court dealt in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962). *Sinclair* involved proposed injunctive action against not one, but three separate activities all categorically protected by the unequivocal language of Subdivisions (a), (e) and (i) of Section 4 of the Norris-LaGuardia Act. (Act of March 23, 1932, 42 Stat. 70, c. 90, 29 U. S. C. 104(a), (e) and (i).) The Union actions stayed by the district court in the instant case were clearly not Section 4 activities. The court below so found.[5]

Textile Workers v. *Lincoln Mills*, 353 U. S. 448 (1957), controls the present case, not *Sinclair Refining*. *Lincoln Mills* and the instant case, unlike *Sinclair*, involve non-Section 4 activity. The plaintiff in *Lincoln Mills* sought the same basic relief the Association requested and obtained from the district court. The only difference between *Lincoln Mills* and the present case is that the recalcitrant party in *Lincoln Mills* (the employer) merely refused to

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[5] Judge Hays said:

"... in the present case the Union must be held to have failed to establish that the activities which have been enjoined are included in any of the categories of Section 4" (317 F. 2d at 626).

arbitrate. Here the Union not only refused to arbitrate but had initiated steps designed to deprive the inevitable arbitration of any effectiveness.

Despite his realization that this was not a Section 4 case, Judge Hays felt that Section 7 of Norris-LaGuardia (29 U. S. C. 107) applied. This same argument was made and rejected in *Lincoln Mills*. This Court dismissed this contention then because:

> "The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation or 'voluntary arbitration'. Though a literal reading might bring the dispute within the terms of the Act (citation omitted), we see no justification in policy for restricting § 301a to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act. . . . The congressional policy in favor of the enforcement of the agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-La Guardia Act (353 U. S. at 458-459)."

The same considerations apply *a fortiori* to the instant litigation.

The Union has not only agreed to arbitrate any dispute but has specifically agreed that "pending decision . . . conditions existing prior to the dispute shall be maintained" (¶ 34, R. 8). The latter provision necessarily complements the former. It exists in order that one party may not, by

changing the status quo, deprive the other of the benefits intended by the mutual promise to arbitrate all disputes. The Union is not making "every reasonable effort" to settle this case by "voluntary effort" (Norris-LaGuardia, Sec. 8, 29 U. S. C. 108). It is doing exactly the opposite. It is making sure that any arbitration of this dispute will be an idle gesture. Norris-LaGuardia condemns rather than protects the Union's conduct. We submit that the "congressional policy in favor of the enforcement of agreements to arbitrate" (*Lincoln Mills* at 458) is as much at stake here. Consequently, there is no reason to require the Association to run the gauntlet of Section 7 in order to obtain specific enforcement of both the Union's agreement to arbitrate and its supplementary agreement to maintain the status quo pending arbitration.

This distinction between Section 4 and non-Section 4 activities has been specifically recognized by this Court on several occasions. In *Sinclair Refining* itself, this Court noted that:

> " . . . the equitable relief granted in that case [i.e. *Lincoln Mills*]—a mandatory injunction to carry out an agreement to arbitrate—did not enjoin any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of the United States courts" (370 U. S. at 212).

Earlier, in *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960), the railroad argued that Norris-LaGuardia had not prevented the issuance of labor injunctions in the past. This Court answered (at 338) that none of the cases (except *Bhd. of Trainmen* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30 (1957), a clear Section 4 case) cited by the railroad "enjoined conduct which the Norris-

LaGuardia Act withdrew from the injunctive power of the federal courts". However, it was clear that, as in *Lincoln Mills*, the literal terms of Section 7 covered every case and, in fact, the applicability of Section 7 had been vigorously pressed in several (i.e. *Graham* v. *Bhd. of Firemen*, 338 U. S. 232, 238-239 (1949) and *Bhd. of R.R. Trainmen* v. *Howard*, 343 U. S. 768, 774 (1952)).

The distinction that this Court has drawn both before and in *Sinclair* has been recently endorsed by the Fourth Circuit in *Parks* v. *IBEW*, 314 F. 2d 886 (4th Cir.), *cert. denied* 372 U. S. 976 (1963). *Parks* involved a local's request that the international union be enjoined from revoking its charter and also restrained from replacing it with another local. Even though the Fourth Circuit admitted that the congressional policy in favor of enforcement of inter-union contracts was not as clearly-defined as that favoring enforcement of promises to arbitrate, it granted the injunctive relief. This Court denied certiorari. The Fourth Circuit said that *Lincoln Mills* applied, not *Sinclair*, since the injunctive relief sought did not transgress any Section 4 activity (See 314 F. 2d at 918, especially n. 57). It concluded that, though Section 7's language did cover the case, it would follow this Court's lead and not insist on that section's procedural requirements in a non-Section 4 case.

We submit that Section 4 represents the limit of the full applicability of the Anti-Injunction Act when that application conflicts with a clear congressional policy such as that favoring enforcement of undertakings to arbitrate. This is the lesson of *Sinclair* and the only "plainly expressed congressional purpose" involved in this case. [Cf. *Sinclair Refining* v. *Atkinson*, 370 U. S. 195, 213 (1962).]

Syres v. *Oil Workers Int'l Union*, 350 U. S. 892 (1955) presented a similar situation. There, the question was

whether a lower court injunction against racial discrimination in the application of a collective agreement should be allowed to stand. This Court did not disturb the injunction because of the clear policy against such racial discrimination [e.g. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944)]. See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 458 (1957). In like manner, this Court has sanctioned injunctions where they were necessary to (1) force a union to submit minor disputes to the Railroad Adjustment Board, *Trainmen* v. *Chicago River and Ind. R. Co.*, 353 U. S. 30 (1957); (2) compel an employer to bargain with a certified union, *Virginia Railway* v. *System Federation*, 300 U. S. 515 (1937) and (3) prohibit a labor union from agreeing with employers to violate the anti-trust laws, *Allen Bradley Co.* v. *Local 3*, 325 U. S. 797 (1945). All these decisions were implementing clear federal labor policies and in each case the language of Norris-La Guardia, though technically applicable, was ignored.

The majority opinion in *Sinclair* said that Congress had rejected the argument that injunctions against peaceful strikes were necessary to make the arbitration process effective and, in so doing, "set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration . . . " (370 U. S. at 213). Congress set this "limit" in Section 4. Norris-LaGuardia was intended to eliminate the abuses of the injunction not the injunction. See 75 Congressional Record 4630, 4677, 5491 (1932). Section 4 was deliberately designed to free from injunctions those concerted activities that were most important to organized labor and most subject to abuse by the prior era's "government by injunction".[6] Frank-

[6] "The kinds of acts which had given rise to abuse of the power to enjoin are listed in Section 4." *Lincoln Mills*, 353 U. S. at 458. See also *Chicago River*, *supra*, at 40-41.

furter & Green, *The Labor Injunction* (1930), esp. Ch. 1 at 517; Ch. 5. See Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 243 (1958). The Association agrees that the Anti-Injunction Act should be rigorously applied to a true Section 4 situation[7] [e.g. *Sinclair Refining Co., supra; Bowater S.S. Co.* v. *Patterson*, 303 F. 2d 369, 372 (2d Cir.), cert. den. 371 U. S. 860 (1962) and *Sperry Gyroscope Co.* v. *Hall*, 185 F. Supp. 64 (S. D. N. Y. 1960)]. However, that is not this case.

II.

The congressional policy endorsing private settlement methods would be defeated if a court having power to compel submission to those procedures could not stay action designed to frustrate that mandate.

This country has long been committed to the policy that it is preferable to settle labor disputes by negotiation, mediation and arbitration rather than by economic force. This policy was clearly expressed in Section 8 of Norris-LaGuardia itself (29 U. S. C. 108; see *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953)) and was re-affirmed by Taft-Hartley.[8] This Court has said

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Judge Hays could find "nothing whatever" in the legislative history of 301 (29 U. S. C. 185) to indicate a Congressional intention to "treat any part of the Norris-LaGuardia Act differently from any other part" (317 F. 2d at 627). However, one of the subsections of 301 (i.e. 301e) expressly repealed Section 6 of the Norris-LaGuardia. The 1947 Congress apparently treated Section 6 differently. Also, *Lincoln Mills* holds that the 1947 Congress intended to treat Section 7 differently where the enforcement of agreements to arbitrate were involved.

[8] 29 U. S. C. 173(d) says:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

that this policy can be effectuated only if the parties' settlement machinery "is given full play". *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 566 (1960). See also *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 225 (1962) (dissenting opinion). This full play cannot be established if the agreement to arbitrate can be frustrated by one of the parties.

This and other courts have responded to the invitation laid down in *Lincoln Mills* to establish a new federal common law of labor relations (353 U. S. at 451) by considering the potentially adverse effect on the arbitration process in resolving further questions in 301 suits. Considering the strong pro-arbitration policy set forth in *Lincoln Mills* and subsequent cases, "judicial inventiveness" (*Lincoln Mills* at 457) demanded no less throughout this "early stage of experience in this area". *Carey* v. *Westinghouse Electric Co.*, 32 U. S. L. WEEK 4080, 4083 (1/6/64) (concurring opinion). In *Chicago River, supra*, this Court said that the allowance of a strike over an arbitrable dispute would effectively defeat the jurisdiction of the arbitral tribunal. 353 U. S. at 39. Similarly, in *Teamsters* v. *Lucas Flour*, 369 U. S. 95 (1962), this Court implied a no-strike obligation into a collective agreement containing an unconditional promise to arbitrate. The main reason given was that:

> "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare" (at 105).

In short, this Court has expressed the view that an effective arbitration procedure is a basic element of the federal common law developed since *Lincoln Mills*.[9]

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[9] *Sinclair*, 370 U. S. at 216 (dissenting opinion). Lower federal courts have followed this Court's lead. The argument that arbi-

The only decision that has somewhat diminished the importance of arbitration has been *Sinclair Refining* and that particular result was required by the direct applicability of Section 4. Even in *Sinclair*, the majority opinion recognized the importance of not undercutting the right to arbitrate disputes. Justice Black pointed out that applying Section 4 did not in any way "impair the right of an employer to obtain an order compelling arbitration" (370 U. S. at 214). *Sinclair* denied the employer the "enjoyment" of an injunction against a strike in violation of contract in addition to damages for the breach of contract. Here, the basic and only relief sought is to compel meaningful arbitration. To compel arbitration and yet deny the stay, as the Second Circuit did, would allow the Union to emasculate any arbitration that may be held concerning this issue. This would clearly "impair" the Association's right to resolve disputes with the Union by arbitration.

A closer analogy is the pre-*Enterprise Wheel* situation. It was not clear until *United Steelworkers* v. *Enterprise Wheel Corp.*, 363 U. S. 593 (1960), that a federal court had jurisdiction in a 301 suit to order a party to abide by an arbitration award. *Lincoln Mills* had only ruled that arbitration could be compelled. The question of specific enforcement of an arbitration award under Section 301 first arose in *A. L. Kornman Co.* v. *Amalgamated Clothing Workers*, 264 F. 2d 733 (6th Cir.), cert. denied 361 U. S. 819 (1959), where the court concluded:

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tration should not be compelled if the dispute was arguably subject to the jurisdiction of the NLRB was rejected by the Second Circuit on this very ground. *Carey* v. *General Electric*, 315 F. 2d 499 (2d Cir.), petition for cert. filed 31 U. S. L. WEEK 3366 (May 2, 1963) (No. 114). It ruled (p. 509) that this could not be a valid objection to arbitration because the strong policy in favor of arbitration expressed in *Textile Workers* v. *Lincoln Mills* and *Steelworkers* v. *Warrior and Gulf* "might be immeasurably frustrated" if the recalcitrant party could prevent arbitration by this route. Cf. *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962).

> "If the United States District Courts have jurisdiction and may order compliance with the grievance arbitration provisions of a collective bargaining agreement, they must necessarily have jurisdiction to enforce the resulting awards. To hold otherwise would render the entire arbitration machinery merely time-consuming and useless. Authority to compel arbitration carries with it authority to enforce the resulting award" (at 737).

The Fourth Circuit was more explicit in *Textile Workers* v. *Cone Mills Corp.*, 268 F. 2d 920 (4th Cir.), cert. denied 361 U. S. 886 (1959). They enjoined the employer from disregarding the award because:

> "The purpose of Congress to give effect to employer-union contracts and to afford full relief for breaches of those contracts would be frustrated if the courts should decree specific performance to agreements to arbitrate but deny enforcement to arbitration awards which the parties have agreed in advance to accept . . . [since] relief in the form of specific performance is as appropriate and as necessary in one case as the other to effectuate the Congressional will" (at 925).

Though the ultimate question was laid to rest by *Enterprise Wheel*, the above reasoning is appropriate for the present inquiry. The power to compel arbitration necessarily carries with it the power to compel adherence to the eventual award. It should also, for the identical reasons given in those cases, carry with it the power to make arbitration meaningful. Both types of supplementary relief are necessary to give "full play" to the particular promise to arbitrate and encourage resort to arbitration as a means of settling labor disputes. As Justices Burton and Harlan said in their concurrence in *Lincoln Mills*, "Having juris-

diction over the suit, the court was not powerless to fashion an appropriate federal remedy." 353 U. S. at 460.

The importance this and other courts have ascribed to the effective enforcement of contractual undertakings to arbitrate indicates why the submission of the mandatory injunction compelling arbitration to the "inapposite procedural requirements of Section 7" was not ordered by this Court in *Lincoln Mills* and should not have been ordered by the Second Circuit in the instant case. Those procedural requirements, by their nature,[19] could not have been intended to apply to orders enforcing agreements to arbitrate or agreements to maintain the status quo.

In *Lincoln Mills*, Justice Douglas cited *Local 205* v. *General Electric*, 233 F. 2d 85 (1st Cir. 1956), with approval to demonstrate the inappropriateness of applying Section 7. Chief Judge Magruder's detailed analysis in that case can scarcely be augmented. He concluded that the strictures of Section 7 need not be met as a prerequisite to compelling arbitration by reason of the "language and background of the Norris-LaGuardia Act itself" (233 F. 2d at 92). His remarks apply with equal force to the instant case where the basic relief sought is similarly the compelling of arbitration. Here, the union's collateral activities were undermining the very arbitration federal law requires it to join. If Judge Hays' reasoning and broad application of Section 7 were adopted, *Lincoln Mills* would be effectively overruled. Indeed, the congressional policy favoring arbitration would become, to paraphrase Chief Judge Magruder, a "snare and a delusion" (*Local 205* at 92).

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[19] For example, subparagraph (e) of Section 7, 29 U. S. C. 107(e), requires a finding that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. Of course, the usual prerequisites for equitable relief found in Section 7, were applied by the district court here under Rule 65, F. R. Civ. P.

III.

The request for a stay is a simple appeal to the traditional ancillary jurisdiction of a court of equity and not a prayer for a labor injunction.

The Association's basic request is that the Union be required to abide by its contractual promise to arbitrate. Its request for a stay of the Union's attempts to discipline Rowan pending the arbitration of that issue is an appeal to the inherent equity power of the federal court for supplementary relief. And the supplementary relief is based upon a parallel promise to preserve the status quo until the arbitration is decided. This kind of judicial enforcement of a party's voluntary undertakings is a far cry from the kind of injunctions that Norris-LaGuardia was designed to prohibit or regulate. This Court has recognized the distinction between injunctions and ancillary stays. Compare *Baltimore Contractors Inc.* v. *Bodinger*, 348 U. S. 176, 184 (1955), with *Goodall-Sanford* v. *Textile Workers*, 353 U. S. 550, 551 (1957), and cf. *E. T. Simonds Construction Co.* v. *Local 1330*, 315 F. 2d 291, 295 (7th Cir. 1963). Many other cases have ruled that a stay issued in an equitable proceeding, such as a suit to compel arbitration, is not analogous to an injunctive order. See *Wilson Bros.* v. *Textile Workers*, 224 F. 2d 176 (2d Cir.), cert. den. 350 U. S. 834 (1955) and cases there cited: *Armstrong-Norwalk Rubber Corp.* v. *Local 283*, 269 F. 2d 618, 620-621 (2d Cir. 1959). Cf. *Turkish State Railways Admin.* v. *Vulcan Iron Works*, 230 F. 2d 108 (3rd Cir. 1956).

The Association's request that the Union be compelled to arbitrate, sustained by both lower courts, was the principal relief sought. The request for enforcement of the status quo clause was an appeal to that inherent equity jurisdiction which operates to ensure that judicial orders will not

be meaningless. The issuance of the stay by the district court is justified both by that court's ancillary jurisdiction to protect the efficacy of its mandates [see 1 Moore *Federal Practice*, 822-823 (2d Ed. 1955)] and its undoubted power under § 301(a) to enforce this provision of the collective bargaining agreement.

The drafters of Norris-LaGuardia recognized this long-established ancillary jurisdiction of a court of equity. They did not intend to impose any limitations on it. Senator Lewis, one of the Act's supporters, said:

> "There is no effort on the part of any Senator here on either side of the Chamber or on the part of any member of the committee, minority or majority, in any wise to affect—far less to reduce or destroy—the just jurisdiction of the courts in a full exercise of the equity power which is vested in the Federal courts by the Constitution of the United States." 75 Cong. Record 4754 (1932).

Senator Norris, one of the co-authors of the bill, made similar statements, viz:

> *Senator Norris*: . . . it is not an inherent power of a court, for instance, to be endowed with jurisdiction to issue injunctions, is it? An inherent power, as I understand, is one necessary to enable the court to protect itself, and so forth.
>
> *Senator Hebert*: To enforce its mandates.
>
> *Senator Norris*: Yes; but would not Congress have the right, *without interfering with any of its inherent powers*, to take any jurisdiction away from any inferior Federal Court? (75 Cong. Record 4682 (1932), emphasis supplied)

Further evidence that the drafters of Norris-LaGuardia fully appreciated the difference between inherent equitable

powers and a standard labor injunction is supplied by the language they employed. They used "injunction" in Sections 4, 5, 7, 9 and 10 and "injunctive relief" in Section 8. Yet, in Section 3 they forbade all "legal or equitable relief". This distinction indicates that the 1932 Congress certainly did not mean to withdraw all equitable relief by means of Section 7. Accord: *Local 205* v. *General Electric Co.*, 233 F. 2d 85, 91 (1st Cir. 1956), aff'd 353 U. S. 547 (1957).

As mentioned above, this collective bargaining agreement contains an express mutual promise to maintain the status quo pending decision of disputes (§ 34, R. 8). Section 6 of the Railway Labor Act contains a similar, albeit statutory, provision.[11] In *Bhd. of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), this Court re-established a status quo order. The railroads had instituted new work schedules despite a strike. They sought and obtained a preliminary injunction but were required to rescind their changes and maintain the status quo ante. The Fifth Circuit (266 F. 2d 335 [1959]) affirmed the injunction but refused to sustain the status quo requirement. This Court restored that condition. Speaking for a unanimous court,[12] Chief Justice Warren said that since *Bhd. of R.R. Trainmen* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30 (1957), authorized the injunction, the status quo order was necessary

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[11] Section 6 says in part:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon. . . ." (45 U. S. C. 156)

Of course, this contract's status quo provision was voluntarily assumed by the parties and not imposed by statute.

[12] Justices Harlan and Stewart agreed that the status quo order was within the power of the district court to issue but would have remanded the case to the Fifth Circuit for review of the companies' contention that the district court had abused that discretion.

if that decision was not to be cut back. Since the injunction was proper, the status quo order was proper because it was "designed . . . to promote the interests of justice" and "to preserve the jurisdiction of the [National Railroad Adjustment] Board" (363 U. S. at 534). Herein, the same considerations apply. The order compelling arbitration is proper. Therefore, the specific enforcement of the related status quo provision is proper. It is designed to promote the interests of justice in that it carries out the parties' intentions. Equally important, it preserves the eventual arbitration order from being emasculated by unilateral union action.

Stays of court proceedings pending arbitration of the same dispute are common. United States Arbitration Act § 3, 9 U. S. C. § 3; N. Y. CPLR § 7503 (formerly N. Y. C. P. A. § 1451). See also, e.g., *Signal-Stat Corp.* v. *Local 475, etc.*, 235 F. 2d 298 (2d Cir. 1956); *Drake Bakeries* v. *Bakery Workers*, 196 F. Supp. 148 (S. D. N. Y. 1960); *In Re Julius Wile Sons & Co.* (Sup. Ct. N. Y. Co. 1949), 13 L. A. 733, and *In Re Atlantic Basin Iron Works* (Sup. Ct. N. Y. Co. 1951), 16 L. A. 641. These ancillary orders are so traditional an exercise of an equity court's jurisdiction that they are seldom considered injunctions though they often have a similar effect. We are not aware of any case holding that a supplementary decree having the same effect as an injunction must satisfy the appropriate anti-injunction statute. In *United States Pipe & Foundry Co.* v. *United Steelworkers*, 37 N. J. 343, 181 A. 2d 353 (1962), the employer brought a declaratory judgment suit for a declaration as to the arbitrability of certain grievances. He also requested a stay pending that judicial determination.[15]

[15] It is significant that the union did not argue that the stay request was an injunction until the main case was over and it became apparent counsel fees might be awarded if it could be styled as a request for an injunction. See 181 A. 2d at 361-362.

One of the questions presented was whether the stay request came under that state's "Little Norris-LaGuardia Act". This determination was crucial with respect to the request for counsel fees. The Supreme Court of New Jersey said:

> "The employer's action . . . is not an injunction suit at all in the sense that term is used in such laws. The instant action is actually nothing more than a declaratory judgment suit asking for a judicial declaration as to arbitrability of the particular grievance under the labor contract. *The prayer for an injunction amounts only to an ancillary request for a stay of the arbitration pending the determination*" (181 A. 2d at 361, emphasis added).

That is a correct characterization of this case since the basic relief sought here was the order compelling arbitration and the stay was ancillary relief.

Nor have courts hesitated to exercise this ancillary equity jurisdiction when it became necessary to stay non-judicial proceedings threatening an orderly resolution of the question by arbitration. Two cases have recently addressed themselves to this problem and both have stayed such collateral proceedings pending arbitration.

In *Old Dutch Farms Inc.* v. *Milk Drivers & Dairy Employees*, 222 F. Supp. 125 (E. D. N. Y. 1963), the union refused to continue an arbitration it had started with petitioner. Instead, it initiated another arbitration with other signatories to the same labor contract involving the same question. The union invited the petitioner to join this second arbitration or face "such action as may be necessary to enforce the contract without further notice" (at 131). As here, the union had embarked on a course unmistakably intended to nullify the first arbitration. The employer im-

mediately sued to compel the union to continue the first arbitration and to stay all other arbitrations on the same issue. The district judge granted the stay.

The district judge made two points. He said that the union had violated the covenant of fair dealing every contract contains. Although the *Dutch Farms* contract did *not* contain a status quo provision,[14] the judge felt that one must be supplied since every contract by implication contains:

> ". . . a covenant not to do anything that will destroy or injure the rights of others to receive the fruits of the contract; a covenant or implied obligation to cooperate with the other so that he may obtain the full benefits of performance" (at 130).

The court ruled that the union's conduct violated these implied covenants and issued an order enjoining it "from participating in any other arbitration proceeding involving the same issue until the pending proceeding . . . is completed" (at 131). Here, the same matter is involved in the proposed arbitration and in the internal union proceedings. In fact, the Union's conduct here will, if not stayed, more effectively nullify the meaning of the arbitration proceeding than the Union's activities in *Dutch Farms*. A refusal of the stay in *Dutch Farms* would have permitted the second arbitration to continue. Since that involved the identical issue the dispute would have ultimately received an arbitrator's consideration. Therefore, *Dutch Farms* pre-

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[14] The contract did contain a provision that an unsuccessful re-arbitration of the same issue would be penalized by fees and other costs which the court read as an undertaking not to multiply arbitration proceedings. However, the court admitted that the agreement was "silent as to what conduct the parties expected from each other once an arbitration proceeding was commenced" (at 130). The agreement here was not silent (See § 34, R. 8).

sented a much stronger case for refusal of the stay. That would not, as here, have entirely precluded effective arbitration of the dispute.

The other important aspect of *Dutch Farms* was the district court's treatment of the request to stay all other arbitrations involving the same issue. The court answered this in one sentence. It said:

> "The employer's application to enjoin the Union from arbitrating with other signatories was merely a prayer for relief incidental to its claim for breach of contract" (at 129-130).

That is this case.

Finally, *Macneish* v. *N. Y. Typographical Union 6*, 205 F. Supp. 558 (S. D. N. Y. 1962), which the district court judge in this case said answered all the present questions correctly (R. 4), is directly in point. The Association sought to compel arbitration and restrain the Union from going forward with proposed disciplinary proceedings against another Times foreman. Judge Bryan ordered arbitration and granted the stay. Norris-LaGuardia was neither discussed nor argued.[15]

This Court has sanctioned the issuance of stays of judicial proceeding pending arbitration. That was the relief sought in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962) and *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254 (1962). At no stage in either litigation was it ever suggested by court or counsel that the stay would contravene any labor statute of the United States or that the inappropriate procedural requirements of Section 7 of

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[15] See especially *Int'l Longshoremen* v. *Galveston Marine Ass'n*, 358 S. W. 2d 607 (Ct. Civ. App. Tex. 1962), where a trial court's injunction upholding the status quo was held a valid exercise of traditional equity jurisdiction.

Norris-LaGuardia be followed. This Court denied a stay in *Atkinson* and granted one in *Drake Bakeries*. In *Atkinson*, Justice White, for a unanimous Court, said that:

> "We are not satisfied from the record now before us . . . that any significant issue in the damage suit will be presented to and decided by an arbitrator" (at 243-244).

In the present case, the issue which the arbitrator will determine is integrally connected with the internal union disciplinary action. More important, *Atkinson* did not involve an explicit contractual promise to maintain the status quo. In fact, the opposite was the case. (See paragraph nine of the collective agreement, 370 U. S. at 253.)

In *Drake Bakeries, supra*, this Court upheld a stay of a federal court damage action pending completion of arbitration of the same issue. The crucial consideration, absent in *Atkinson*, was that the employer had expressly agreed to arbitrate all disputes. By ordering arbitration and staying the employer's district court suit pending that arbitration, the company was simply remitted to the forum it had chosen. Justice White said that the Court must be guided by what would in the particular context of each case "best promote industrial peace" (at 266). In *Drake Bakeries*, since the company had agreed to arbitrate the particular question it had to be held to that bargain. It is clear that the Mailers' Union has undertaken to arbitrate this issue. Both lower courts so held. The Association merely requests that, as in *Drake Bakeries*, the Union be held to its bargain and not allowed to take unilateral action effectively designed to negate its contractual commitments.

Drake Bakeries is in point for yet another reason. Justice White, for the Court, said that if the stay were denied only the no-strike clause would be enforced whereas granting the stay would enforce both the no-strike and the arbitration

clauses. The Court found the latter alternative preferable (at 264). To affirm the Circuit Court in this case would constitute only enforcement of the arbitration clause of this agreement. The covenant to maintain the status quo would be ignored. On the other hand, the granting of the stay would enforce both the arbitration and status quo provisions. The Association contends that this result is preferable for the same three reasons given in *Drake Bakeries* (see 263). These parties outlined a settlement procedure. They considered one of its important aspects the mutual pledge to maintain existing conditions pending decision. This provision was intended to supplement the main promise to arbitrate. To deny it enforcement would (1) not enforce part of the collective contract; (2) undermine the parties' private settlement procedure and (3) refuse to place a necessary sanction behind the promise to arbitrate. Thus, the stay vacated by the Second Circuit should be restored because:

> "Under our federal labor policy . . . we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this" (*Drake Bakeries*, at 263-264).

CONCLUSION

It is submitted that the judgment of the Court of Appeals, insofar as it reverses the order of the district court granting a stay of Union disciplinary proceedings pending arbitration, be reversed and the order of the district court reinstated.

Respectfully submitted,

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Dated: January 16, 1964

APPENDIX

SECTIONS 4 AND 7, NORRIS-LAGUARDIA ACT

"SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70, 29 U. S. C. § 104."

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"SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial

of relief than will be inflicted upon defendants by the granting of relief:

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. Mar. 23, 1932, c. 90, § 7, 47 Stat. 71, 29 U. S. C. § 107."

SECTION 301(a) OF THE TAFT-HARTLEY ACT

"SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

UNITED STATES ARBITRATION ACT

"§ 3. *Stay of proceedings where issue therein referable to arbitration*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action

until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669."

"§ 4. *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear

and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. July 30, 1947, c. 392, § 1, 61 Stat. 669."

"§ 6. *Application heard as motion*

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. July 30, 1947, c. 392, § 1, 61 Stat. 669."